89-1246

90-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989__

RAMSEY S. AGAN,

Petitioner

vs.

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

STEVEN H. SADOW
Counsel of Record
800 Grant Bldg.
44 Broad St.
Atlanta, GA 30303
(404) 522-9400

GEORGE E. BUTLER II
201 Peachtree Cir., NE
Atlanta, Georgia 30309
(404) 873-2544

28 pp

QUESTIONS PRESENTED

Petitioner Agan ("Agan"), the Honorary Turkish-American Counsul in Atlanta, was denied a height variance from a local zoning ordinance under circumstances which he believed rendered the denial arbitrary, discriminatory, and unjust.

The Supreme Court of Georgia (reversing the Court of Appeals) held in this case that Georgia's 1851 Bribery Statute could be applied, consistent with modern norms of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, so as to criminalize Agan's subsequent conduct in lobbying two county commissioners to reverse their earlier action **because** he made otherwise valid, expressly unconditional, and clearly denominated "campaign contributions" to them at the same time.

Because of (i) the widespread existence of similarly-worded bribery statutes in other states and at the national level, (ii) emerging public controversy over the pervasive use of campaign contributions as an adjunct to lobbying, (iii) conflicting views held by state and federal courts as to whether the First Amendment limits the literal application of such statutes in the critical area of campaign contributions to instances in which a quid pro quo arrangement is proposed, and (iv) resultant confusion over whether pressure for campaign finance reform should be

directed towards more sweeping application of the vaguely-worded antique bribery statutes already on the books or towards new, more carefully-tailored legislation that takes into account the First Amendment interests at stake, this Court should consider the following questions:

1. Whether the Georgia Bribery Statute as applied to Agan's conduct is unconstitutionally vague and overbroad under the First and Fourteenth Amendments, since the statute (as written and as charged to the jury) criminalizes otherwise valid, unconditional "campaign contributions," when coupled with protected lobbying activity, by enabling the trier of fact to infer a corrupt purpose to "influence" official acts purely on the basis of the chronological coincidence between the contributions and the lobbying and the common perception that the "natural consequence" of any sizeable campaign contribution is to "influence" the recipient?

2. Whether Agan may be said to be a hard-core violator of some core of constitutionally proscribable conduct that may be outlawed by the Georgia Bribery Statute? Or whether Agan is entitled instead to acquittal as a matter of law on this record since it is clear that as part of his lobbying efforts he expressly disclaimed any quid pro quo expectations in return for the unconditional "campaign contributions" for which he was

indicted?

3. Whether the actions of Agan in discussing the merits of his variance application with two local commissioners and seeking their support, as well as his concurrent and unconditional delivery to them of otherwise valid "campaign contribution" checks from members of the local Turkish-American community (which he funded and which were used expressly to symbolize the significance of his project for that ethnic community), constitute political conduct (with a particularized message) falling within the core protection of the speech, association, and petition guaranties of the First Amendment?

4. Whether the State of Georgia has sufficiently important interests unrelated to the suppression of political communication that are implicated on this record to justify application of the so-called *O'Brien* test to its prosecution of Agan under the Georgia Bribery Statute?

5. Whether the State of Georgia can justify prosecuting Mr. Agan under its Bribery Statute for the aforesaid conduct, consistent with the First Amendment, based on its interest in preventing the reality and the appearance of political corruption, even though it did not require the jury to find that the campaign contributions were part of any express or implied quid pro quo arrangement between Mr. Agan and the recipients?

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OPINIONS BELOW

The Opinion of the Supreme Court of Georgia (App. A, *infra*) is reported at ___ Ga. ___, 384 S.E.2d 863 (1989). The Opinion of the Court of Appeals is (App. B, *infra*), is reported at 191 Ga.App. 92, 380 S.E.2d 757 (1989).

JURISDICTION

The judgment of the Supreme Court of Georgia (App. A, *infra*) was entered on October 26, 1989. Petitioner filed a timely Motion for Reconsideration on November 6, 1989, which was denied by the Supreme Court

on November 9, 1989. (App. C, *infra*).

This Court has jurisdiction to review the judgment of the Supreme Court of Georgia by Writ of Certiorari pursuant to 28 U.S.C. Section 1257(a). The Petition is timely under 28 U.S.C. Section 2101(d) and Rules 20.1 and 20.4 of this Court.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Amendment XIV to the United States Constitution states, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Amendment I to the United States Constitution states, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Official Code of Georgia Annotated Section 16-10-2(a)(1) provides, in relevant part, that:

> A person commits the offense of bribery when . . . [h]e gives or offers to give to any person acting for on behalf of the state or any political subdivision thereof . . . any benefit, reward, or consideration to which he is not entitled

> with the purpose of influencing him in the performance of any act related to the functions of his office.

Official Code of Georgia Annotated Section 21-5-3(6) provides, in pertinent part, that:

> [A reportable campaign] '[c]ontribution' means a gift, . . . or anything of value . . . transferred for the purpose of influencing the nomination for election or election of any person for office . . . . The term 'contribution' shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office.

STATEMENT OF THE CASE

Introduction

To place the following facts in brief perspective, Petitioner Ramsey Agan ("Agan") attacks his 1989 conviction under the Georgia bribery statute (the "Statute"), O.C.G.A. Section 16-2-2(a)(1), on the basis that the Statute is unconstitutionally vague as applied to his case--a problem that is compounded by the statute's simultaneous "as applied" overbreadth, trenching as it does on Agan's core First Amendment rights to associate, petition

or lobby, and make campaign contributions in the political arena.

Specifically, Agan objects to the Statute insofar as it defines the crime of bribery as follows:

> [G]iv[ing] or offer[ing] to any ... [public official] any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any [official] act ....

Id.(Emphasis added.) It is Mr. Agan's contention that the Statute is unconstitutional because of the uncertain meaning of the phrases "any benefit, reward, or consideration to which he is not entitled" and "with the purpose of influencing him" as applied to campaign contributions--and because of the failure of the Georgia courts to provide juries with any clue on how to distinguish "good" from "bad" **influencing** contributions.

That is so, even though Agan has conceded from the beginning of this case that the trial judge--through curative instructions to the jury--could easily have overcome the twin "facial" infirmities in the Statute. In his own Request to Charge No. 9 (App. D, *infra*), Mr. Agan proffered to the court the appropriate saving construction of the statute: namely, that otherwise valid campaign contributions can be considered bribes only if made or offered "conditional[ly]" as part of a quid pro quo arrangement.

That suggested bright line rule (the "Quid Pro Quo Rule") for use by the triers of fact in separating the core of constitutional-

ly proscribable conduct that the Statute clearly prohibits from the "innocent" acts which necessarily fall within the protected breathing space required by critical First Amendment political and associational freedoms is firmly grounded in federal and state case law.

As authoritatively interpreted below, however, the Statute vests standardless discretion in prosecutors, judges, and juries to make *ad hoc* scapegoats out of unpopular, misunderstood figures like Agan, a most convenient **Turkish American** scapegoat--to the detriment of true system-wide campaign finance reform.

Facts and Proceedings Below

Petitioner, the Honorary Turkish Consul in Atlanta, wanted to construct a hotel on a five-acre parcel of land he owned in DeKalb County, Georgia. In the hotel Agan hoped to provide meeting space for the local Turkish-American Association of which he was an official and also space for Turkish medical patients for whom he was trying to negotiate a special arrangement with the Emory University Medical Clinic.

With the necessary zoning in place, Agan sought a building height variance for the hotel in order to give the structure needed visibility from the adjacent and elevated Interstate Highway 285 and to compensate for the low-lying terrain. Such topographical problems normally augur well for variance applications. Moreover, his application was supported by the County's professional plan-

ning staff and was heard without opposition from neighboring property owners. Nonetheless, it was summarily denied by the DeKalb County Commission with no discussion of the merits after Agan was allowed five minutes for his presentation.

Thereafter, Agan was given to understand that the negative vote had been a foregone conclusion due to political "logrolling" by the Commissioner in whose district the property lay. That Commissioner supposedly asked her fellow commissioners to vote down the Agan request as a courtesy to her and the presumed wishes of her absentee homeowner constituents.

Perceiving himself to be the victim of political arbitrariness or ethnic discrimination, Agan concluded that in either case just to have his application heard on the merits rather than dismissed out of hand, *i.e.*, just to gain access to the respectful ear of the Commissioners, he had to fall in line and contribute--since making sizable campaign contributions to the Commissioners is a widespread practice among other local land developers.

As the record shows, Agan reluctantly reached that conclusion **only after** comparing the zoning success of other developers in the habit of making such contributions to his own persistent failure--even in cases involving the same piece of property--and **only after** being convinced that his variance application had not been heard on its merits, but was rejected instead for arbitrary reasons, and **only after** questioning his attorney as to the propriety of following this dubious but widespread practice.

The attorney, based on his understanding of the Quid Pro Quo Rule, counseled Agan to go ahead so long as the contributions were made "in exchange for nothing, no action or inaction." (T.,vol.iv at 850-51.)

Hence Agan formulated plans to create a sort of *ad hoc* Turkish-American PAC as part of his continued efforts to convince the other Commissioners as to the merits of his project.

Thereafter, Agan submitted another variance application and spoke with two DeKalb County Commissioners, Lanier and Fletcher, to find out what he could do to assure the approval of his application. In addition to discussing with them the substantive merits of his application, Agan told them that he had a number of friends in the local Turkish-American Association who wished to contribute to their campaign to show their support for his project.

Eventually, Agan offered checks to Lanier and Fletcher totalling $7500 drawn on the accounts of several of his friends with Turkish-American surnames. Those individuals also testified they were reimbursed for the checks by Agan and believed Agan wanted the contributions to come from different people in order to communicate the impression that he enjoyed broad support in the Turkish community for his project.

Throughout their private discussions of the merits of his project, which included a meeting with an engineer, the two Commissioners expressed probable opposition to his application. Yet when pointedly asked by each Commissioner (for the benefit of hidden S.B.I. video cameras) what he expected in return for

the contributions, Agan, true to the advice of counsel, strenuously reiterated that he expected nothing beyond the respectful hearing he had already received.

To Commissioner Lanier he stated:

> Nothing, not a thing, that's one thing I want to make clear, nothing, because I appreciate what you have done for me so far previously . . . .

In response to Commissioner Fletcher's statement that the campaign contributions were "unusual" and made him "feel funny" because he allegedly had never before received contributions from someone with a matter pending before the Commission, Agan averred:

> Well, it's not supposed to--well, I don't want you to be under pressure. . . . I am not asking for anything except I will assure you, the way I feel, you will be doing service to the county because where's the tax base; and the proposed use for it will be . . . enhancing.

Agan was then indicted under Georgia's Bribery Statute.

Although not an issue before this Court, it is noteworthy in light of the danger of discriminatory prosecution cognate with a vagueness attack that the trial court denied Agan's pre-trial motion for an evidentiary hearing on a selective prosecution defense to the indictment. Agan claimed that he could not be prosecuted for paying money to County

Commissioners for the purpose of influencing their vote on a pending land use application because the district attorney had not prosecuted many other developers who made similar payments.

Agan's rejected proffer of proof consisted of the names of all persons who made campaign contributions to Commissioners Lanier and Fletcher contemporaneously with the pendency before the Commission of zoning or other land use applications filed on behalf of such donors. Despite Commissioner Fletcher's protestations to the contrary, the total number of such contributions for the two Commissioners was 252, totalling $176,850. Agan also presented affidavit testimony that the County Commission chairman had used a derogatory ethnic term in referring to Agan after a debate on the original variance application filed by Agan.

(Both appellate courts below concurred in reversing the decision of the trial court on this issue and remanding the case to the trial court for a hearing on Agan's claim of selective prosecution.)

More pertinently, however, at the conclusion of the trial, the trial court rejected various Requests to Charge from Agan (App. D. *infra*), which embodied the theory[1] that the

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1. In substance, the Requests to Charge at issue set out the following coherent theory of a valid campaign contribution, which we paraphrase:

One may lawfully make a campaign contribution by check payable directly to an incumbent office holder [Request to Charge No. 3,

prohibition in the 1851 Bribery Statute against giving a public official "**any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any [official] act,**" O.C.G.A. {16-10-2(a)(1) (emphasis added) must be read together with language in the recent Georgia Ethics in Government Act, O.C.G.A. {{21-5-1, *et seq.*, which specifically contemplates that certain public officials, *i.e.*, those holding elective office, are entitled to receive and use private contributions for campaign purposes, even though they may have been given "**to encourage or influence**" the official in the performance of his duties, O.C.G.A. Section 21-5-3(6)(3rd sentence) (emphasis added).

In short, Agan contended that the Ethics in Government recognizes that under certain circumstances there can be **good** "influencing"

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citing O.C.G.A. { 21-5-33]--for use by him in a future campaign [Request to Charge No. 5, citing O.C.G.A. { 21-5-33]--even though that contribution may "reasonably be construed to influence" the incumbent in the performance of his duties [Request to Charge No. 4, citing O.C.G.A. { 21-5- 3(6)]--and it is the incumbent's clear legal responsibility to report the contribution [Request to Charge No. 7, citing O.C.G.A. { 21-5-34]--and under no circumstances may the incumbent use the contribution for personal use unless all donors are notified, etc. [Request to Charge No. 6, citing O.C.G.A. { 21-5-33(c)]--and if the jury finds that the payments in question to Commissioners Fletcher and Lanier were such a campaign contribution, it must acquit [Request to Charge No. 8].

campaign contributions, especially in light of the sociological fact of modern life that it is commonly accepted practice in this era of PAC's for campaign contributions to be made and accepted under circumstances where the fact or amount of the contribution is intended to reflect the size of the interested constituency and to favorably **influence** the recipient at least to the extent of giving them and their views so-called "access" or consideration.

As to how the jury should be charged to distinguish "good" from "bad" influencing contributions, Agan had proffered the court the Quid Pro Quo Rule in his Request to Charge No. 9.

Instead, the trial court grudgingly conceded that a campaign contribution could have only one valid purpose under Georgia's Bribery Statute, namely, to influence the **re-election** of the Commissioners.

The clear implication to the jury, therefore, was that if a large campaign contribution was also made with the hybrid or mixed motive of garnering some influence or access as well, it would fall squarely within the Bribery Statute.

And what specific criminal intent did the trial court require the jury to find? It charged that it is merely the intent "to commit the act which is prohibited by a statute," Trans., vol. IV, p. 804, and that that intent may "be inferred when it is the natural and necessary consequence of an act," *id.*--or "the natural and the probable consequenc[e] of his act." Trans., vol. iv, p. 805.

That abbreviated charge[2] sealed Defendant

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2. The actual charge delivered by the court on the substantive elements of the crime (App. E, *infra*) covered a scant fifty-three lines--roughly 450 words.

Almost one-half of that brief space was devoted to a statement of the definition of bribery under {16-10-2(a)(1) in which the court defined "entitled" (as that word appears in the phrase "any benefit, reward, or consideration to which he is not entitled") as meaning simply "to give a deed or title to."

Then, abruptly, the Trial Court launched into a terse discussion of the subject of campaign contributions:

> There is in Georgia law an Act, which is known as the Ethics in Government Act. This Act, among other things, discusses campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution . . . A campaign contribution means a gift, an advance or a deposit of money, or anything of value, conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office.

The Court went on to say that "a campaign contribution, as I have just defined to you, can be made directly to the [candidate] for use in future campaigns for elective office."

The Court cryptically concluded as follows:

> In this regard, and in light of the instructions I have given you earlier, I will tell you that it is not the use to which the money may be put, but it is the purpose for which

Agan's fate by making the verdict a mini-plebescite on the apparent impropriety of the wide-spread practice of DeKalb County developers making large campaign contributions to the DeKalb County Commissioners, who continually rule on projects of direct interest to their political patrons.

The jury was in effect set free by the trial court to convict Defendant Agan purely on the basis of the chronological coincidence between any substantial campaign contribution made directly to a County Commissioner, which the latter is ostensibly free to pocket for his own use[3], and lobbying efforts by the contributor in support of a pending land use application before the recipient, since it is popularly inferred that all such contributions do have the "natural and probable consequence" "of influencing [the recipient, at least to

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the money was paid that controls.

And what specific criminal intent did the Trial Court require the jury to find? As noted in the text, it charged that it is merely the intent "to commit the act which is prohibited by statute," and that such intent may "be inferred when it is the natural and necessary consequence of an act"-- or, alternatively, "the natural and probable consequenc[e] of his act."

3. Rejected Request to Charge Nos. 6 and 7 related to the clear duty under Georgia's Ethics in Government Act of the recipient of earmarked campaign contributions, such as were made to Commissioners Fletcher and Lanier, to report those contributions and not to use them for personal gain.

some intangible extent] in the performance of a[n official] act"--which was the only intent necessary under the trial court's instructions to convict Agan.

The jury convicted Agan of bribery.

Agan attacked his conviction before the Georgia Court of Appeals on the basis that the Bribery Statute was unconstitutionally vague and overbroad under the First and Fourteenth Amendments unless construed *in pari materia* with the Ethics in Government Act so as to embody the Quid Pro Quo Rule.

The State argued that any such saving construction of the Bribery Statute would make **convictions** thereunder impossible, because it would give an individual the ability to insulate himself from prosecution for any contribution made with the intent of "corrupt influence" by the simple expedient of a self-serving written or oral declaration that the bribe is a "campaign contribution."

Nonetheless, the Court of Appeals appeared to agree with Agan that the two statutes must be construed *in pari materia* and harmonized in favor of the Ethics in Government Act if any **prosecutions** under the Bribery Statute are to be possible at all.

It reversed Agan's conviction on the basis the the trial court's charge to the jury on the meaning of "entitled," as it appears in the Bribery Statute, was so "incomplete and misleading" as to be reversible error, because it failed to construe its meaning *in pari materia* with the Ethics in Government Act and (ii) that the court's failure to give Agan's Requests to Charge Nos. 2, 3, 4, and 8 based on the Ethics in Government Act, especially

Charge No. 4, or to explain the evidence supporting them was reversible error since those charges embodied Agan's sole defense.

Pretermitted Charge No. 4 provided as follows:

> A campaign contribution is a payment which can reasonably be construed to encourage or influence a public officer holding elected office.

The Court of Appeals did not conclude that **all** "influencing" campaign contributions are legal, nor did it direct the trial court to charge the jury in the language of requested Charge No. 4 verbatim, nor did it actually adopt the Quid Pro Quo Rule.

Instead, its opinion appeared to skirt the constitutional dilemma identified by Agan by acknowledging the self-evident proposition (embodied in O.C.G.A. }21-5-3(6)) that there can be **good** "influencing" campaign contributions; on the other hand, it put the onus on the trial court, if the case were retried, of deciding the appropriate instructions to the jury on how to draw the critical line between good and bad "influencing" contributions.

At the instance of the State the Georgia Supreme Court granted certiorari to the Court of Appeals to review its opinion, especially insofar as the Court of Appeals construed the Bribery Statute *in pari materia* with the Ethics in Government Act.

Broadly construing the Court of Appeal's opinion as meaning "in effect, that if money given to an officeholder qualifies as a campaign contribution, requiring reporting under the Ethics in Government Act, OCGA {21-5-1 et

seq., then it cannot be a bribe . . .," the Supreme Court reversed and affirmed Agan's conviction.

It held that there was no logical reason why the fact that an "influencing" campaign contribution is made reportable under the Ethics in Government Act should immunize the maker of such a contribution from criminal liability under the Bribery Statute.

It rejected Agan's argument that the pressure for construing the Bribery Statute and the Ethics in Government Act *in pari materia* was not logical but constitutional, finding that his vagueness attack was disposed of by the court's earlier holding that "[b]ribery is a well-known word, used widely and understood generally . . . [as the] '"act of influencing the action of another by corrupt inducement."....'"

Treating his First Amendment overbreath attack separately, the Court denied that *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976), and its progeny require the Quid Pro Quo Rule as a limitation on the scope of the Statute.

While noting that *Buckley* dealt with limitations upon the <u>amounts</u> of campaign contributions or expenditures rather than with restrictions on the <u>purposes</u> for which contributions may be offered or solicited, the Court held that even if *Buckley* were fully applicable to the Statute, it would be an untenable absurdity to interpret the First Amendment as shielding "the bribery of a public officer."

Based on its assumption that the crime of bribery is self-explanatory, even as applied to campaign contributions, the Court conclud-

ed:

> Citizens of Georgia have every right to try to influence their public officers--through petition and protest, promises of political support, and threats of political reprisal. They do not have, nor have they ever had, the "right" to buy the official act of a public officer. OCGA §16-10-2(a).

In a footnote the Court elaborated on its out-of-hand rejection of Agan's First Amendment arguments and the Quid Pro Quo Rule:

> [W]e are concerned that . . . [the quid pro quo] "rule" would proliferate corrupt practices. As example, note the story in the Atlanta Journal and Constitution of July 8, 1989: "A millionaire who handed out $10,000 checks on the [Texas] Senate floor while legislation that interested him was pending said the checks were political contributions, not an attempt to bribe lawmakers. 'It would be difficult to make it into a bribery case,' said [the district attorney], who believes it's time to change Texas's loose campaign finance laws. 'In Texas, it's almost impossible to bribe a public official as long as you report it. . . .'"

In conclusion, the Supreme Court held that any error in the charge by the trial court was harmless, since "the more appropriate meaning of 'entitled' is more restrictive than the definition given by the trial court," and affirmed Agan's conviction.

REASONS FOR GRANTING THE PETITION

This case is of extreme national importance.

Just as the unchanged 70-year old flag contempt statute in *Smith v. Goguen*, 425 U.S. 506, 573-75, 94 S.Ct. 1242 (1974), was found by this Court to embody the fatal First Amendment vagueness/overbreadth of many similar statutes of the same vintage[4], so, too, does

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4. The legal concept of vagueness grew out of due process concerns and pertains to the failure to alert a person of common intelligence as to what conduct is legally forbidden, that is, the failure to give fair notice of what conduct to avoid. Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926)("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law ..."); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1973).

In this case the Georgia Bribery Statute couches its prohibitions in terms so indefinite that the line between condemned bribes and "innocent" campaign contributions and lobbying efforts became a matter of guesswork--a trap for the unwary.

In addition to the lack of "fair notice," statutory imprecision or vagueness creates at least three additional problems of especial moment where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. Buckley v. Valeo, supra, 424 U.S. at 41, 96 S.Ct. at 645.

Those problems have to do with (1) the fact that imprecise statutory language gives too much prosecutorial discretion to law enforcement officers, with the attendant dangers of arbitrary and discriminatory enforcement, which is especially intolerable given the controversy that often surrounds the exercise of First Amendment rights, Grayned v. Rothford, supra, 408 U.S. at 108-09 n.4; (2) the fact that the lack of statutory

Georgia's 139-year old general bribery statute.

Many states have similarly worded statutes that were manifestly designed for a pre-PAC horse and buggy era. More particularly, they were not designed to be applied to elected officials at all[5], especially those with

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guidelines for differentiating good from bad in certain grey areas of conduct creates "a standardless sweep [that allows] ... [judges] and juries to pursue their personal predilections," with a potential for arbitrary censorship especially intolerable in sensitive First Amendment areas, Kolender v. Lawson, 461 U.S. 352, 358 (1983), quoting Smith v. Goguen, 415 U.S. 506, 574-75, 94 S.Ct. 1242 (1974); and (3) the fact that vague laws may inhibit protected First Amendment activity by inducing "citizens" to '"steer far wider of the unlawful zone" ... than if the boundaries of the forbidden areas were clearly marked.'" Grayned v. City of Rockford, supra, 408 U.S. at 108-109, 92 S.Ct. at 2299.

Accordingly, where a vagueness challenge is mounted against a criminal statute like the Georgia Bribery Statute that implicates an "area of the most fundamental First Amendment activities," Buckley v. Valeo, supra, 424 U.S. at 14, 96 S.Ct. at 632, greater judicial scrutiny will be employed and a greater degree of specificity required by the reviewing court than in other contexts. Id. 424 U.S. at 41, 96 S.Ct. at 645; Smith v. Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247 (1974). In short, it is the potential First Amendment overbreadth of the Georgia statute that mandates this Court's most exacting review.

5. Accordingly, the Fifth Circuit in United States v. Dozier, 672 F.2d 531 (5th Cir. 1982), citing Buckley v. Valeo, supra, acknowledged that the constitutionally-protected status of fundraising activities may complicate the enforcement of old-line general bribery and extortion statutes. After all, the mere "[d]eman[d] for money by an unelected official may

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constitute extortion per se," 672 F.2d at 537 (emphasis added), just as in Georgia the mere receipt of money by an unelected official, which he has not earned ("to which he is not entitled"), where the recipient is in a position to officially help the donor, has traditionally warranted a presumption of an intent on the part of the donor to influence or bribe the official in Georgia. See, e.g. Ingram v. State, 97 Ga. App. 468, 473-74, 103 S.E.2d 666 (1958)(involving a policeman of the City of Atlanta); Slaughter v. State, 99 Ga. App. 239, 108, S.E.2d 161 (1959 (involving a Bibb County deputy sheriff and two Bibb County policemen).

Such legal presumptions, mirrored in the very language of the current Georgia Bribery Statute, may be especially useful where, as has often happened in the past, both parties were willing participants to the transaction and neither had a ready explanation of why one would be giving money to the other.

But where one of the parties to the transaction is an elected official, authorized under our system to solicit and receive contributions, the Dozier court points out that the convenient presumptions of old general bribery statutes fly out the window.

Accordingly, the Fifth Circuit inscribed a bright line around the presumed core purpose of the Hobbs Act:

> Whether described familiarly as a payoff or with the Latinate precision of quid pro quo, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

Id. As with Senator Brewster in United States v. Brewster, 506 F.2d 62 (D.C.Cir. 1974), the Defendant in Dozier, "who demanded specific amounts of money for specific favors," "f[ell] squarely within the 'hard-core' of the statute's proscriptions," as redefined. Id. at 540, quoting Broadrick v. Oklahoma, 413 U.S. 601, 608, 93 S.Ct. 2908, 2914 (1973).

The approach taken by the Dozier court, therefore,

broad discretionary powers and a perceived duty to be responsive to the legitimate political grievances of their constitiuents.

Unfortunately, as numerous commentators have noted, once old bribery statutes like Georgia's are applied literally to elected officials, there is no basis for distinguishing between a bribe and a protected campaign contribution other than the utterly vague notion of "corrupt" intent to influence, thus clearly implicating First Amendment vagueness/overbreath concerns, especially in light of *Buckley*. *See, e.g.*, Note, Campaign Contributions and Federal Bribery Law, 92 Harv. L. Rev. 451, 453-55 (1978). Once it is conceded that a campaign contribution can be a "thing of value" for bribery purposes, "the result is that the potential sweep of the bribery statutes is enormous." Lowenstein, Political Bribery and the Intermediate Theory of Politics, 52 U.C.L.A. L. Rev. 784, 809 (1985) ("Political Bribery").

To avoid that standardless sweep, numerous courts[6], expressly seeking to reconcile antique bribery statutes with modern First Amendment norms, have found a solid core of constitutionally proscribable activity only through application of the "bright line" of the Quid Pro Quo Rule. For example, in People v. Brandstetter, 103 Ill.App.3d 259, 430

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is to rehabilitate old-line general extortion or bribery statutes, to the extent they implicate campaign contributions or fund-raising activities, by requiring proof of an explicit demand or promise of a quid pro quo arrangement, as the case may be.

N.E.2d 731, 736 (1982) cert. denied, 459 U.S. 988, 103 S.Ct. 342 (1982), a case virtually identical to this, the Illinois Appellate Court adopted on First Amendment grounds the saving construction of its bribery statute that the court below summarily rejected:

> We thus conclude that the Illinois statutory scheme defines with specificity "property or personal advantage" which a legislator is "authorized by law" to accept [and which a contributor is therefore authorized to offer or give].
>
> ... [I]t is ... clear that ... public officials are "authorized by law" to receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for performance of a specific official act is given [or demanded] in exchange.

Needless to say, the Quid Pro Quo Rule does not leave states defenseless against political corruption. This Court in Buckley has already given the green light to certain types of restrictions on campaign contributions. Indeed, Buckley upheld prophylactic limits on the amount of campaign contributions against First Amendment attack as being one of the least restrictive means of curbing the appearance and reality of political corruption, based on the Court's stated belief that bribery laws "deal with only the most blatant and specific attempts of those with money to influence governmental action."

424 U.S. at 28.

In the context of *Buckley* that observation was tantamount to an assertion that bribery laws cannot effectively be tailored to deal with the more subtle yet troubling examples of political influence buying cognate with sizeable campaign contributions.

Unfortunately, the problem here is that the legislatures in states like Georgia and Texas have not yet seen fit accept this Court's invitation to adopt precise campaign contribution limits or regulations.

Once the Georgia General Assembly does that or once it attempts to carefully rewrite the Bribery Statute itself, demonstrating that it "has focused on the First Amendment interests [implicated by the application of the unrevised 1851 statute in this particular context] and determined that other governmental policies compel [new and more carefully tailored] regulation," those regulations will be entitled to considerably more deference that the vague, outmoded statute at issue here. *Grayned v. City of Rockford*, 408 U.S. 104, 104 n.5, 92 S.Ct. 2294 (1972). *See also Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 638 (1976).

The real problem, therefore, is that there are increasing pressures on the elected local judiciary not to wait for the legislature to act in such thoughtful and carefully-tailored way and not to be perceived as condoning political corruption in the meantime.

There is even a widespread perception (currently underscored by the ongoing "Keating Five" scandal in the nation's capital) that existing federal campaign contributions limi-

tations have not curtailed "legalized bribery" and that in fact no legislative will exists to reform the system further[7].

Accordingly, into the breach come reformers like Professor Lowenstein advocating that the judiciary pick up the slack through a sweeping application of the vague, literal strictures of antique state bribery statutes.

For instance, he cogently argues that there is no reason in logic why a campaign contribution designed to gain "access" to the ear of a legislator in order to lay before him or her the merits of the contributor's political grievance should not be deemed by a jury a corrupt attempt to influence an "official action":

> [A] legislator's time is so limited that the decision to listen to one person's argument and information on an issue and not another's is itself an official action.

Lowenstein, Political Bribery, *supra*, at 828.

Accordingly, writing in 1985 Professor Lowenstein proposed that this new crisis of legislative timidity be solved by prosecutors and the courts:

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6. *See* note 5, *supra*.

7. A key reason cited by the court below for rejecting the Quid Pro Quo Rule was the apparent campaign corruption in Texas under such a judicial regime. In fact, Texas has no quid quo pro rule, its bribery statute having been exprelly rewritten in 1975 to provide that "campaign contributions made and reported in accordance with law cannot be considered bribes." Tex. Penal Code Ann. Section 36.01 (Vernon

> It is a significant and politically relevant fact that under our present system of campaign finance, politicians and interest groups engage routinely, not in "legalized bribery," as is commonly supposed, but in felonious bribery that goes unprosecuted primarily because the crime is so pervasive.

Id. at 848. In short, understandably frustrated with the status quo and ignoring the First Amendment implications of his proposal, Professor Lowenstein recommends that the nation's antique bribery statutes be dusted off and applied with extreme literalness to all "influencing" campaign contributions--a recommendation that the Georgia Supreme Court has now unflinchingly adopted. In the process it armed Georgia prosecutors, judges, and juries with a spiked club with high potential for First Amendment mischief (as evidenced by Agan's viable discriminatory ethnic prosecution claim in this case).

Thus, in dismissing Petitioner's vagueness/overbreath challenge to the Georgia Bribery Statute on the basis that "[b]ribery is a well-known word, used widely and understood generally . . . [as the] '"act of influencing the action of another by corrupt inducement"...,'" the Georgia Supreme Court was blinking reality in response to mounting public pressure for campaign finance reform.

Nor is the fact that "influencing" contributions for "access" purposes are so prevasive and accepted irrelevant to the First Amendment claims here. If "[i]t is true that

under the present system of campaign finance, many groups have no choice but to make ... contributions that are intended to influence official conduct," Lowenstein, Political Bribery, *supra*, at 848, then such contributions may be an essential *de facto* part of the exercise of one's lobbying or petition rights. *Cf. Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39, 81 S.Ct. 523, 529 (1961). As one observer has noted, "ninety-nine percent of lobbying in Washington, D.C. . . . is now fund-raising." E. Drew, *Politics and Money, the Road to Corruption* 58 (1983).

Perhaps that explains why the Georgia Supreme Court--in order to affirm to all that the meaning of the Bribery Statute is perspicuously clear, as it has always been, even as applied to campaign contributions--had to reverse a 5-to-3 decision of the Court of Appeals to the effect that times have indeed changed over 139 years in light of the First Amendment and modern campaign finance.

It is no coincidence that this Court has helped to shape the countervailing modern consensus[8] reflected in the decisions above

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Supp. 1985).

8. Even commentators like Professor Lowenstein, who favor abandonment of the current consensus in favor of the quid pro quo, concede its existence, noting that bribery laws are supposed to require a quid pro quo--an explicit exchange of a specific benefit for a specific official action (or inaction), while complaining that the requirement is evaded easily and is difficult to prove even when it has not been evaded.

that general bribery statutes should not be construed to apply to campaign contributions except in the the clear-cut and aggravated case of an express or implied "quid pro quo." Welch, The Federal Bribery Statute and Special Interest Campaign Statutes, 79 J. Crim. L. & Criminology 1347, 1369-70 (1989); Weeks, Bribes, Gratuities and the Congress: The Institutionalized Corruption of the Political Process, 13 J. of Legislation 23, 130 (1986).

Most recently in *Federal Election Committee v. National Conservative Political Action Committee*, 470 U.S. 480, 105 S.Ct. 1459 (1985) ("NCPAC"), this Court reiterated the lesson of *Buckley* that preventing political corruption and the appearance of corruption is the only legitimate and compelling state interest so far identitifed for restricting campaign contirbutions. Id. at 496. In defining that interest, the Court stated that: "The hallmark of corruption is the financial quid pro quo, dollars for political favors." *Id.* (emphasis added.)[9]

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Id. at 819, 809 & n.90. See, e.g., A. Etzioni, Capitol Corruption 22 (1984); Wright, Money and the Pollution of Politics: Is the First Amendment Now an Obstacle to Political Equality?, 82 Colum. L. Rev. 609, 618 (1982).

9. In evaluating the propriety of the campaign finance limitations in *NCPAC* the Court noted twice in as many pages (in language quoted from Buckley) that the absence of "prearrangement and coordination" between PAC expenditures and candidates benefited thereby "alleviates the danger the expenditures will be given as a quid pro quo for improper commitments from the candidates." 470 U.S. at 497 and 498.

Clearly, Agan's conduct in lobbying Commissioners Fletcher and Lanier for their support and making campaign contributions was independently protected by the First Amendment's guaranties of speech, association, and petitioning. Although Buckley ultimately upheld contribution limitations, as opposed to the expenditure limitations, it initially held that both campaign contributions and expenditures are at the very core of political speech and association. 424 U.S. at 16.

Moreover, in upholding the individual contribution limitations of FECA, this Court noted in Buckley that campaign contributions usually serve as "a general expression of support for the candidate and his views, but do not communicate the underlying basis for

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Elsewhere in Buckley this Court clearly prefigured the analysis that the Georgia Supreme Court should have employed in the present case--an analysis that points clearly to the Quid Pro Quo Rule.

In addressing the vagueness challenge to Section 608 (e)(1)'s expenditure ceiling on expenditures "relative to a candidate," which the Court of Appeals had construed to mean contributions "advocating the election or defeat of" a candidate, the Court noted that the supposedly clear-cut distinction between discussion of issues and advocacy of a particular candidate dissolve in practice and "could pu[t] the Speaker in these circumstances wholly at the mercy of the various understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." 424 U.S. at 43, quoting Thomas v. Collins, 323 U.S. 516, 535, 65 S. Ct. 315, (1945).

Hence, to avoid the First Amendment vagueness problems, the Court limited the reach of {608(e)(1) to explicit words of advocacy such as "vote for," "elect," or "support." Id. at 43, 44, n.52.

The parallel to the quid pro quo rule is obvious, to the extent it is interpreted to require an

the support." Id. at 21. In this case, however, the campaign contributions from Agan embodied an expressive element beyond "the undifferentiated, symbolic act of contributing," id., in that Agan structured the contributions so as to convey the particularized message that his proposed hotel development was of significance to the larger Turkish-American community.

As in Buckley, therefore, the so-called O'Brien test does not apply because the governmental interest here in suppressing certain campaign contributions is "not unrelated to the supression of free expression." United States v. O'Brien, 391 U.S. 367, 377, v. 8, 1673, 1679 (1968). Buckley, supra, 424 U.S. at 17.

CONCLUSION

Because the decision by the Georgia Supreme Court is out of step with the Illinois Appellate Court and federal courts which have expressly addressed the First Amendment issues at stake here and because it may be symptomatic of a growing state judicial frustration over legislative inaction in the face of needed campaign finance reform, which could lead to similar efforts to revive vague, outmoded bribery statutes as blunt instruments to stop political corruption at unacceptable First Amendment cost, and for the other reasons stated above, Supreme Court review is warranted and this petition for Writ of Certiorari should be granted.

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expresss or clearly implied proposal for a quid pro quo to be present for conviction of bribery in a campaign finance context.

Respectfully submitted,

STEVEN H. SADOW
Counsel of Record
800 Grant Bldg.
44 Broad St.
Atlanta, GA 30303
(404) 522-9400

GEORGE E. BUTLER II
201 Peachtree Cir., NE
Atlanta, Georgia 30309
(404) 873-2544

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served by mail this 8th day of January, 1990, to:

Robert E. Wilson, Esquire
DeKalb County District Attorney
District Attorney's Office
707 DeKalb County Courthouse
Decatur, Georgia, 30030.

_____
Steven H. Sadow

In the Supreme Court of Georgia

Decided: 10/26/89

46967. THE STATE V. AGAN ET AL.

HUNT, Justice.

We granted certiorari to the Court of Appeals in Agan v. State, 191 Ga. App. 92 (_____ SE2d _____) (1989) to review that opinion, with emphasis upon "[t]he correct interpretation of the offering of a bribe, as prohibited by OCGA { 16-10-2(a)(1), and the acceptance of a 'campaign contribution,' as defined in OCGA { 21-5-3(6)."

The facts, more fully set forth in the Court of Appeals' opinion, are summarized as follows. Agan, the Honorary Turkish Consul in Atlanta, sought a building height variance for the construction of a hotel on his property. Agan and Sarper, an Emory University professor, had discussed with officials of the Emory Medical Clinic a plan to bring Turkish patients to the Clinic who would stay at the hotel. The DeKalb County Commission had twice rejected Agan's application for a variance. Agan submitted a third application, and spoke with two DeKalb County commissioners, Lanier and Fletcher, inquiring what Agan could do to insure the approval of his application. Agan told Fletcher he had a number of friends in the local Turkish-American Association who

wished to contribute to Fletcher's campaign. At a meeting between Agan and Fletcher, Agan urged Fletcher to support the variance application, then left Fletcher with four checks totaling $3,700.00, made to Fletcher personally, and marked "for campaign contribution," despite Fletcher's protests that he did not even have a campaign bank account. The checks were drawn on the accounts of Sarper and three others who testified they were reimbursed for the checks by Agan and believed Agan wanted contributions to come from different people in order to give the impression he enjoyed broad support in the Turkish community. After another meeting between Agan and Fletcher in which Agan reiterated his need for the variance, Agan presented Fletcher with a fifth check for $800.00 marked as a campaign contribution, from a third party. Agan, accompanied by Sarper, also met with Lanier to discuss the variance. As they left Lanier's office, Sarper gave Agan an envelope at Agan's request and, back in Lanier's office, without Sarper, Agan presented Lanier with the envelope containing Sarper's check to Lanier for $3,000.00 marked "campaign contribution," despite Lanier's statement to him that he was not up for reelection for three years. The Court of Appeals, on appeal from Sarper and Agan's convictions for bribery, ordered a new trial for Agan, and vacated Sarper's conviction for insufficient evidence.

Sufficiency of the Evidence

1(a). The Court of Appeals correctly determined under the standard established by

Jackson v. Virginia, 443 US 307 (99 SC 2781, 61 LE2d 560) (1979), that a rational trier of fact could have found the essential elements of the crime of bribery to have been established beyond a reasonable doubt in regard to Agan. There was ample evidence at trial that Agan gave payments to Lanier and Fletcher for the specific purpose of influencing their votes on his application for a building height variance, thus committing the crime of bribery. See Division 2(a) below.

1(b). We decline to review the Court of Appeals' holding that the evidence against Sarper was insufficient to support the verdict of guilty. See our Rule 30(1).

The Charge

a. The state contends the Court of Appeals erred in holding the trial court's charge constituted reversible error. The trial court charged the jury on the definition of the offense of bribery as set forth in OCGA { 16-10-2(a)(1), which provides that:

"[a] person commits the offense of bribery when ...[h]e gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof ...any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office."

The trial judge then stated to the jury that "the word 'entitled' does not have any specif-

ic or extraordinary or particular legal terminology or definition. I will charge you the word 'entitle' means to give a deed or title to." Regarding the Ethics in Government Act, OCGA { 21-5-1 et seq., the court charged:

A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred for the purposes of influencing the nomination for election or election of any person for office.... [A] campaign contribution, as I have just defined for you, can be made directly to the candidate...[U]nder Georgia Law campaign contributions can be made for use in future campaigns for elective office...: [I]t is not the use to which the money may be put, but it is the purpose for which the money was paid that controls."

2(b). The Court of Appeals found the trial court's charge faulty for failing to read the bribery statute, OCGA { 16-10-2, in conjunction with the Ethics in Government Act, OCGA { 21-5-1 et seq., which defines political contributions and sets forth the manner in which they may be received and reported. In particular, the Court of appeals held the language of the bribery statute prohibiting the giving or offering to a public officer of a benefit to which that officer "<u>is not entitled</u>," is to be read very narrowly to proscribe the giving or offering to a public official of a benefit to which that officer "<u>is not qualified or privileged to receive or has no grounds or right to seek, request or receive.</u>" 191 Ga. App. at p. 97. [Emphasis supplied]. The

Court of Appeals further held

a campaign contribution, whether made to a candidate in the heat of a campaign or to encourage or influence the official after he is elected, is something which a candidate or elected official is qualified or privileged to request or receive and thus something to which he is "entitled" within the meaning of OCGA { 16-10-2.

191 Ga. App. at p.98. We interpret this holding as meaning, in effect, that if money given to an office holder qualifies as a campaign contribution, requiring reporting under the Ethics in Government Act, OCGA { 21-5-1 et seq., then it cannot be a bribe. With this conclusion we respectfully disagree.

The Ethics in Government Act has in no manner altered the bribery statute. The Act simply defines a campaign contribution[1] and,

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1. The term "contribution" is defined in OCGA { 21-5-3(6) as follows:

'Contribution' means a gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, bringing about the recall of a public officer holding elective office or opposing the recall of a public officer holding elective office, or the influencing of voter approval or rejection of a proposed constitutional amendment, a state-wide referendum, or a proposed question which is to appear on the ballot in any county or municipal election. The term specifically shall not include the value of personal services performed by persons who serve without compensation from any sources and on a voluntary basis. The term 'contribution' shall in-

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clude other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office.

Although portions of the foregoing language might be read to authorize bribery of a candidate for public officer, we decline to interpret the statute to reach such an absurd result. An explanation for the somewhat inartful language of the statute may be found in its legislative history. The predecessor statute to the Ethics in Government Act (the Financial Disclosure Act, Ga. L. 1974, pp. 155 et seq.) defined "contribution" as follows:

"'Contribution' means a gift, subscription, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for the offices provided for in section 2." Ga. L. 1974, p. 155.

The following year, the act was amended to provide:

"'Contribution' means a gift, subscription, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for the offices provided for in section 2, but the term specifically shall not include the value of personal services performed by persons who serve without compensation from any source and on a voluntary basis. 'Contribution' shall include retained fees, fees or any other form of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence the candidate or office holder to introduce legislation which enriches the person, company, corporation or other entity which made the contribution. Introduction of such enriching legislation by the

having defined requires disclosure. Specifically, nothing in the Act permits a public office holder to request or receive anything of value "to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office or employment...." (OCGA { 16-10-2 (a)). Nor is the term "entitled," as contained in the bribery statute, modified in any way by the Ethics in Government Act. Other than those emoluments of public office that are expressly authorized and established by law, no holder of public office is entitled to request or receive -- from any source, directly or indirectly--anything of value in exchange for the performance of any act related to the functions of that office.[2]

As noted above, the Court of Appeals

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candidate subsequent to his election to office shall be prima facie evidence that the fee, compensation or retainer fee was a campaign contribution under the meaning of this Act." Ga. L. 1975, p. 1122-23.

The Ethics in Government Act carried forward the substance of this definition, but removed the words that restricted the term "influence" to influencing the introduction of enriching legislation. We view this not as an attempt to restrict the definition of a bribe, but as a manner of enlarging the definition of a contribution so as to insure the reporting of most all transfers to the candidate or office holder.

2. Our holding means that a transfer that is a bribe as defined by OCGA { 16-10-2 also may come within the definition of "contribution" as contained in the third sentence of OCGA { 21-5-3(6). The fact that such a transfer must be reported does not change its character as a bribe.

found the trial court's definition of the term "entitled" misleading because it failed to inform the jury that a public official is entitled to receive campaign contributions. Although we reverse this holding, we note the trial court's charge on the meaning of "entitled," see Division 2(a) above, was somewhat inapt. However, because the more appropriate meaning of "entitled" is more restrictive than the definition given by the trial court, we view any error as helpful to the accused, and harmless.

Constitutionality of the Bribery Statute

Vagueness Challenge

3. We find no merit to Agan's contention that OCGA { 16-10-2(a) is unconstitutionally vague, hence void. A similar contention was rejected in King v. State, 246 Ga. 386, 387-388 (271 SE2d 630) (1980), as follows:

Bribery is a well-known word, used widely and understood generally. Its ordinary signification may mean an "'act of influencing the action of another by corrupt inducement.'...[cit.]"

First Amendment Challenge

4. Agan contends the bribery statute must be interpreted as condemning only a payment to a public officer who agrees to a clearly delineated quid quo pro, i.e., an explicit purchase of an explicit official act.

Were that not so, he insists, the bribery statute would be an impermissible restraint upon free speech under the First Amendment to the Constitution of the United States. He relies principally upon Buckley v. Valeo, 424 US 1 (96 SC 612, 46 LE2d 659) (1976).

In Buckley, the Supreme Court examined the application of the First Amendment to limitations upon campaign expenditures by a candidate for public office, and limitations upon amounts that might be contributed to a campaign, finding a violation of the right of free speech for the former, and none for the latter. The holdings in Buckley do not apply to the bribery statute, which places no limitations upon amounts of contributions or expenditures, but, rather, restricts the purposes for which any "benefit, reward or consideration" may be offered or given to, or solicited or accepted by, a public officer. Even assuming the First Amendment might relate to the purposes of political transfers, it cannot be understood to shield the bribing of a public officer.[3]

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3. "Where the letter of the statute results in absurdity or injustice or would lead to contradictions, the meaning of general language may be restrained by the spirit or reason of the statute." Sirmans v. Sirmans, 222 Ga. 202, 204 (149 SE2d 101) (1966). That logic should apply alike to all legal authorities, including the Constitution.

We decline to follow the "rule," as urged by Agan, of People v. Brandstetter, 103 Ill. App. 3d 259 (430 NE2d 731) (1982), that: "[P]ublic officials are 'authorized by law' to receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for or performance

Citizens of Georgia have every right to try to influence their public officers -- through petition and protest, promises of political support and threats of political reprisal. They do not have, nor have they ever had, the "right" to buy the official act of a public officer. OCGA { 16-10-2(a). Public officers are not prohibited from receiving legitimate financial aid in support of nomination or election to public office. They do not have, nor have they ever had, the

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of a specific official act is given in exchange." Id., at 736. In that case, a political activist was convicted of bribery for handing tc a state legislator a note that read: "Mr. _____, the offer for help in your election & $1000 for your campaign for Pro ERA vote."

While Brandstetter's conviction was affirmed on appeal, we are concerned that its "rule" would proliferate corrupt practices. As example, note this story in The Atlanta Journal and Constitution of July 8, 1989: "A millionaire who handed out $10,000 checks on the [Texas] Senate floor while legislation that interested him was pending said the checks were political contributions, not an attempt to bribe lawmakers. 'It would be difficult to make it into a bribery case,' said [the district attorney], who believes it's time to change Texas's loose campaign finance laws. 'In Texas, it's almost impossible to bribe a public official as long as you report it....'"

"right" to sell the powers of their offices.[4] OCGA { 16-10-2 (b). The bribery statute does not serve to weaken free speech. It serves to strengthen free government.

The Display of Currency

5. We need not determine the propriety of the admission into evidence of currency obtained through the cashing of checks and the district attorney's display of that currency.

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4. The acceptance of a bribe is an egregious conflict of interest, and will vitiate official acts that otherwise appear to be lawful. "When neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors." Cross v. Hall County, 238 Ga. 709, 711 (235 SE2d 379) (1977). For recent cases on conflicts of interest, see Dunaway v. City of Marietta, 251 Ga. 727 (308 SE2d 823) (1983); Wyman v. Popham, 252 Ga. 247 (312 SE2d 795 (1984); Brooks v. Dept. of Transportation, 254 Ga. 303 (4) (328 SE2d 705) (1985); and Vickers v. Coffee County, 255 Ga. 659 (340 SE2d 585) (1986). See also Olley Valley Estates v. Fussell, 232 Ga. 779, 784-785 (208 SE2d 801) (1977): "[W]here self-interested voting has been alleged, the usual rule of only limited review of zoning decisions is abrogated, and judicial inquiry into all the pertinent surrounding circumstances is proper, and this is true whether or not the question of the commissioner's possible bias was raised at the zoning hearing."

Criminal sanctions attached to bribery inhere to the prosecutorial authority of the district attorney. Civil sanctions, as exemplified by the cases cited in this note, lie to an aggrieved citizen, that is, to one who has suffered "substantial damage to a substantial interest." Brand v. Wilson, 252 Ga. 416, 417 (314 SE2d 192) (1985).

The error, if any, was not so harmful as to require reversal under the standard of Johnson v. State, 238 Ga. 59, 61 (230 SE2d 869) (1976).

Selective Prosecution

6. The state contends error in the Court of Appeals' holding that the trial court applied an incorrect standard in denying Agan and Sarper an evidentiary hearing on their selective prosecution defense. The majority held the defendants would be entitled to a hearing on their showing of "colorable entitlement" to that defense. 191 Ga. App. at 99(5).

In support of their pre-trial motion to dismiss for selective prosecution, Agan and Sarper claimed they could not be prosecuted for paying money to county commissioners for the purpose of influencing their vote on a pending land use application because the district attorney had not prosecuted others who have made similar payments. Their offer of proof consisted of: the names of all persons who made money transfers to the two commissioners during the years 1982 through 1987; the names of all such donors who had interests in matters pending before the county commission at the times that the money transfers were made; and, derived from a comparison of those two lists, a list of money transfers that were made to the two commissioners contemporaneously with the pendency before the county commission of applications that had been filed on behalf of such donors. The

number of such transfers was 252.[5]

The Court of Appeals held, contrary to the trial court's holding,[6] that the proffer was sufficient to entitle Agan and Sarper to an evidentiary hearing.[7] We agree. We have stated the rule as to selective prosecution in the following terms:

The party seeking to prove unconstitutionally discriminatory enforcement of the law under Yick Wo [v. Hopkins, 118 U.S. 356 (6 S.Ct. 1064, 30 LEd 220) (1886)] has the burden of presenting sufficient evidence to establish the existence of intentional or purposeful

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5. The indications from the proffer are that, for the years 1982, 1986, and 1987, one of the two commissioners reported 221 transfers of funds from donors having matters pending before the county commission at the times of such transfers. The total thus transferred was $164,900. The other commissioner, in 1984, received from similar donors 31 transfers that totalled $11,950.

6. The trial court's written order recited: "Merely showing that other zoning applicants have made campaign contributions would not be sufficient in the court's opinion to sustain a claim of selective prosecution. The defendants must show that other persons are in the same or similar circumstances and have not been prosecuted. Defendants have made no showing that the state has information similar to the information on these defendants where the state failed to prosecute. For this reason, defendants' motion to dismiss for selective prosecution is denied."

This statement of legal principles is essentially correct. We disagree, however, with the trial court's assessment of the proffer.

7. 191 Ga. App., at pp. 99-100.

discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classifications.

State v. Causey, 246 Ga. 735, 737 (273 SE2d 6) (1980).[8] The proffer here included details of money transfers that were similar to those for which Agan and Sarper were prosecuted, and identified sources of reliable and available evidence, i.e., permanent public records, and names of witnesses who are disinterested in this prosecution. Because the proffer demonstrated a reasonable likelihood that Agan and Sarper might be able to prevail in their contention of selective prosecution under the rule in Causey, they should have been given the opportunity to submit their proofs.[9] Although this issue is now moot as to Sarper, see Division 1(b) supra, Agan is entitled to a hearing on his claim of selective prosecution.

We point out, however, that a proffer strong enough to merit an evidentiary hearing does not, of necessity, equate to proof of selective prosecution. Under the rule of Causey, the fact that only one person is prosecuted for doing what many others do is no

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8. This standard was reiterated in Sabel v. State, 250 Ga. 640, 643 (300 SE2d 663) (1983) and in Dept. of Natural Resources v. Union Timber Corp., 258 Ga. 873, 876 (375 SE2d 856) (1989).

9. On their face, the allegations of Agan and Sarber appear to have more substance than those which were advanced in Sabel, supra, and Causey, supra.

warrant, in itself, for relief.[10] Agan has the burden of proving by the weight of the evidence that his prosecution represents an "intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification."[11] This he must establish, if he can, by proving the averments of their proffer relative to other money transfers,[12] and by showing, through the testimony of the district attorney or otherwise, the extent of any other investigations or prosecutions of donors who are situated similarly.[13] If, notwithstanding the disclo-

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10. "Some selective enforcement is not in itself a constitutional violation." Sabel, supra, at p. 643. The sole fact that only one actor is prosecuted cannot be "selective prosecution," as it then would be impossible to initiate the first prosecution under a new criminal statute, or to begin a "crackdown" on unlawful behavior that had gone unchecked in the past.

11. Causey, supra, at p. 737.

12. The proffer purports to be a list of contributions made to the two commissioners involved with this prosecution. It would be relevant to the issue of "arbitrary classification" to consider a compilation of all financial transfers (within reasonable time limits) that have been made to all voting commissioners during the pendency before the county commission of matters in which the donors had financial interests.

13. Agan and Sarper sought to cross examine the district attorney at the hearing held on their motion. The trial court refused their request, observing: "And before I am going to require the district attorney to get on the stand and let you

sure to the district attorney of the proffer materials, it should appear that he has conducted little or no investigation into apparently similar offenses, or has initiated no prosecutions of any such offenses, only then would it be incumbent upon the district attorney to demonstrate that the prosecution of Agan is something other than selective prosecution.

Depending upon the evidence, the trial judge as trier of fact might find that similar offenses have gone uninvestigated or unprosecuted; that the district attorney knew or should have known of such offenses; and that failure to act is without a reasonable and responsible explanation.[14] Based on such a

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...Continued...

to prosecute cases, a prima facie case and reasonable cause to believe that there is some selective prosecution [must be shown]. I don't think you have shown me enough." Our comment at note 6, above, applies as well to this ruling.

14. The passage of time may be important here. Agan and Sarper were indicted and arrested in July, 1987. The motion as to selective prosecution was filed in September, 1987. Hearing was held in November, 1987, and the court denied the motion in January, 1987. The trial took place in that same month, and

finding, the trier of fact might conclude that the circumstances support an inference of the existence of "intentional or purposeful discrimination" based upon an "unjustifiable standard" of an "arbitrary classification" -- that is, an arbitrary classification whereby only Agan continues to be prosecuted, and all the rest go free. Such a conclusion would equate to selective prosecution.

Accordingly, and notwithstanding the reinstatement of Agan's conviction for want of reversible error during the trial, the case is remanded to the trial court with direction that an evidentiary hearing be accorded to Agan on his proffer. If he should succeed in establishing that his prosecution is "selective prosecution" under the principles we have outlined, his conviction must be vacated. Failing that, his conviction will stand.

5. We have reviewed the remaining contentions on appeal and find no error.

Judgment affirmed in part, reversed in part, and remanded. All the Justices concur.

...Continued...

...Continued...

opinion was handed down in March, 1989.

March 16, 1989

WHOLE COURT

In the Court of Appeals of Georgia

77533. AGAN et al. V. THE STATE.

S-195

SOGNIER, Judge.

Ramsey Agan and Rauf Sarper appeal from their convictions of bribery of public officials in violation of OCGA { 16-10-2 (a) (1).

1. We first address appellants' enumeration on the general grounds.

(a) As to appellant Agan, the evidence adduced at trial disclosed that Agan, the Honorary Turkish Consul in Atlanta, owned a five acre parcel of land in DeKalb County on which he operated several small businesses. There was evidence that Agan wanted to construct a hotel on the property, in which he intended to provide meeting space for the local Turkish-American association of which he was an official, and that he, along with appellant Sarper, an Emory University professor, had held discussions with officials of the Emory Medical Clinic about bringing to the clinic Turkish patients who would stay at the planned hotel. After the DeKalb County Com-

mission twice rejected his applications for a building height variance, Agan submitted a third variance application, then contacted Commissioners Robert Lanier and John Fletcher, inquiring of each official what he (Agan) could do to obtain approval of his application. Fletcher testified that after he met with Agan in May 1987 to discuss technical aspects of the hotel project, Agan attended the Commission's June 9th meeting, and approached Fletcher in the hallway to ask for his support if the variance application came up for a vote. Fletcher testified Agan also stated he had a number of friends in the local Turkish-American association who wanted to contribute to Fletcher's campaign, but Fletcher discouraged the idea because he was not currently campaigning for reelection. This encounter with Agan left Fletcher so "very concerned" that he contacted law enforcement officials about it.

Ten days after the commission meeting, Agan and Fletcher met again, and after pressing Fletcher for his support for the variance application, Agan presented Fletcher with four checks totalling $3,700 made out to Fletcher personally and marked "for campaign contribution." The checks were drawn on the accounts of appellant Sarper and three other individuals, each of whom testified they wrote the checks, for which they were reimbursed by Agan, under the impression that Agan wanted the contributions to come from different people to give the appearance Agan enjoyed broad support in the Turkish community. Only two of the four, Sarper and one other, were aware of Agan's proposed hotel, and both

testified that they knew nothing about the variance application. None of the four knew Fletcher. Fletcher testified that Agan left the four checks on the desk over Fletcher's protests that he did not even have a campaign bank account. Thereafter, at a July 6th meeting between Agan and Fletcher during which Agan reiterated his need for the variance to ensure the economic viability of the hotel project and Fletcher indicated he remained undecided about his vote on the matter, Agan presented Fletcher with a fifth check for $800 from a third party, likewise marked as a campaign contribution. The meeting, which was videotaped by investigators from the DeKalb County District Attorney's office, showed that in response to Fletcher's inquiry as to what Agan wanted from him, Agan stated, "I need your support," but also said "I'm not asking for anything except I'll assure you, the way I feel, you will be doing service to the county because where's the tax base; and the proposed use for it will be ... enhancing."

Also videotaped was Agan's meeting with Commissioner Robert Lanier on July 21, 1987, during which Agan discussed his need for a variance in order to attract a major hotel franchisor, his expected arrangements with Emory for patient referrals, and the objections raised by the other commissioners. Sarper attended this meeting, and as they were leaving Lanier's office Sarper handed Agan an envelope at Agan's request, and Agan and Lanier then walked back into Lanier's office where Agan presented Lanier with the envelope which contained Sarper's check to Lanier for $3,000 marked "campaign contribution." When

Lanier informed Agan that he was not up for reelection for three years, Agan inquired whether Lanier "could build it up." Lanier asked Agan what he wanted for this contribution, and Agan responded, "Nothing. Not a thing. That's one thing I want to make clear, nothing because I appreciate what you have do[n]e for me so far previously; and anything else I can do for you and I will ... be glad to do that."

Other evidence was adduced that Agan's proposed arrangement with Emory involved Agan bringing Turkish patients to Emory with a guaranteed payment of their bills in exchange for which Emory would discount the fees charged and pay some or all of the differential to Agan.

We are convinced, after a careful review of the evidence adduced at trial, including the videotapes of the meetings with Lanier and Fletcher, that under the standard established in Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979), a rational trier of fact could have found the essential elements of the crime of bribery to have been established beyond a reasonable doubt in regard to Agan. Although the evidence was in conflict, resolution thereof is for the jury. Page v. State, 159 Ga. App. 344, 348 (283 SE2d 310) (1981). Bribery is a specific intent crime, requiring proof that the defendant offered money or valuables to a government official "with the purpose [or intent] of influencing him in the performance" of an official act as an essential element of the crime. OCGA § 16-10-2 (a)(1). While proof that a defendant made a campaign contri-

bution to an elected official, even one in a position to cast a vote favorable to the defendant, is not sufficient to show a violation of OCGA { 16-10-2 because the official is "entitled" to receive such contributions, see Division 3, infra, in this case the evidence was sufficient to authorize the jury to conclude that Agan made the payments in an effort to induce a vote in favor of his variance application. See OCGA { 16-2-6; see generally Parham v. State, 166 Ga. App. 855, 856 (1) (305 SE2d 599) (1983).

The indictment charged Agan with giving payments to Lanier and Fletcher for the purpose of influencing their "vote on an application for a building height variance." Construed to uphold the verdict, the evidence disclosed that Agan considered obtaining the variance essential to his ability to achieve a sufficient return on his investment in the property, that he sought the commissioners' support specifically for that issue at the time he made the payments, and that he continued to present checks to Fletcher notwithstanding the latter's protests that he was not actively campaigning. Combined with Agan's concealment of the true source of the funds--himself--this evidence reasonably could have been considered by the jury as proof of a specific intent to bribe public officials. Further, although Agan's variance application was not on the Commission's agenda at the time he proffered the checks to Lanier and Fletcher, there was testimony that the matter could be brought up at any time either by the development board or a commissioner, and Agan told Lanier that another commissioner had agreed to

place the application on the agenda once Agan had obtained enough commitments to ensure a favorable vote. Moreover, contrary to Agan's contentions in his brief, evidence of agreement by the official to whom payments are made to accept the money and act as requested is not essential to proof of intent to bribe the official. See Page, supra at 347-348. Accordingly, we find no error in the trial court's denial of his motion for directed verdict of acquittal. see generally Patterson v. State, 161 Ga. App. 85-86 (4) (289 SE2d 270) (1982).

(b) The evidence adduced as to appellant Sarper, a professor of radiology at Emory and the VA Hospital, reveals that he participated with Agan in the proposal to bring Turkish patients to Emory, although the evidence clearly shows that Sarper was not to receive any remuneration for this plan, but instead hoped to enhance his status at Emory. While he had no financial interest in the property for which Agan was seeking the variance, there was some evidence, albeit disputed, that one of the businesses operating on the property in which Sarper owned a minority interest was to be relocated in the proposed hotel. Sarper's only direct contacts with Fletcher were two brief phone calls in which he encouraged the commissioner to support the hotel project. At the videotaped meeting between Agan and Lanier, Sarper did not join in the conversation except to state that he was present as a representative of the local Turkish-American association to indicate the Turkish community's support for Agan's project and to encourage Lanier to support it. Further, Sarper remained in the waiting area

while Agan presented a check to Lanier. Sarper testified that he was unaware Agan had applied for a building height variance, that he wrote the checks to Lanier and Fletcher and obtained checks from two others at Agan's request because of Agan's desire to demonstrate his political and fund-raising clout to local politicians, and that he (Sarper) assumed the contributions were part of an effort by the national Turkish-American association to encourage lobbying at the local level.

We find the evidence insufficient to authorize a reasonable trier of fact to find the essential elements of the crime of bribery of a public official to have been established beyond a reasonable doubt as to Sarper. As discussed in section (a) of this Division, specific intent must be proved because making of a campaign contribution in an effort to influence an elected official is not sufficient proof of bribery of that official in and of itself. Sarper's presence at the meeting between Agan and Lanier was not sufficient to prove Sarper was a party to the charged bribery. See Brown v. State, 250 Ga. 862, 864-865 (1) (302 SE2d 347) (1983). Since intent cannot be presumed, OCGA { 16-2-6, and the circumstantial evidence presented at trial failed to exclude every other reasonable hypothesis, OCGA { 24-4-6; see Brown, supra at 864-865 (1), in the absence of evidence sufficient as a matter of law to establish the specific intent required by the statute and charged in the indictment, see generally Bowman v. State, Ga. (Case No. 45729, decided Feb. 8, 1989), the trial court erred by denying Sarper's motion for directed verdict of

acquittal. See generally Brown, supra at 864-865 (1).

2. The contention made on appeal that OCGA { 16-10-2 (a) is unconstitutionally vague is meritless. King v. State, 246 Ga. 386, 387-388 (2) (271 SE2d 630) (1980).

3. We find that the trial court's charge on definition of "entitled" under OCGA { 16-10-2 (a) as well as the court's failure to give either requested charges regarding the Ethics in Gcvernment Act, OCGA { 21-5-1, et seq., or an adequate substitute embodying the sole defense raised below, i.e., that the payments were campaign contributions made as part of a lobbying effort by Agan and the local Turkish-American association rather than as bribes, constituted reversible error.

The trial court charged the jury on the definition of the offense of bribery as set forth in OCGA { 16-10-2 (a) (1), which provides that "[a] person commits the offense of bribery when . . . [h]e gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof . . . any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office." (Emphasis supplied.) The trial judge then stated to the jury that "the word 'entitled' does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word 'entitled' means to give a deed or title to." With regard to the Ethics in Government Act, the court charged as follows: "A campaign contribution means a gift, an advance or

deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office. . . . [A] campaign contribution, as I have just defined for you, can be made directly to the candidate. . . . [U]nder Georgia Law campaign contributions can be made for use in future campaigns for elective office. . . . [I]t is not the use to which the money may be put, but it is the purpose for which the money was paid that controls."

"[I]t is an elementary rule of statutory construction that, absent clear evidence to the contrary, words should be assigned their ordinary, logical, and common meaning. [Cits.]" Curlee v. Mock Enterprises, 173 Ga. App. 594, 600 (327 SE2d 736) (1985); see OCGA { 1-3-1 (b). In determining the ordinary signification of a word, in addition to considering dictionary or treatise definitions, courts must consider "the intention with which [the term] is used as manifested by the context and considered with reference to the subject-matter to which it relates. [Cit.]" Thomas v. MacNeill, 200 Ga. 418, 424 (37 SE2d 705) (1946).

Although we recognize that one of the definitions given to "entitle" is substantially the same as that charged by the trial court, see Black's Law Dictionary, that same source also defines "entitle" as "[t]o qualify for; to furnish with proper grounds for seeking or claiming." "Entitle" or "entitled" also has been defined as connoting "the grant-

ing of a privilege or right . . .; to give the right to demand or receive; . . . to furnish with grounds for claiming . . .; to furnish with grounds for seeking," 30 CJS Entitle 720-721, and as "'qualified.'" Davis v. City Council, 90 Ga. 817, 820 (17 SE 110) (1893). We construe the clear intendment of OCGA { 16-10-2 (a) as proscribing the giving or offering to a government official, with the intention of influencing the official in the performance of his duties, any benefit, reward, or consideration which he is not qualified or privileged to receive or has no grounds or right to seek, request, or receive.

Further, as OCGA { 16-10-2 (a) addresses the receipt of items of value by elected officials, we agree with appellants that it should be read in conjunction with the Ethics in Government Act, which defines political contributions and sets forth the manner in which contributions may be received and reported. See generally Thomas, supra at 424. The Act defines campaign contributions as, inter alia, an "advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, . . . [and] other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office." OCGA { 21-5-3 (6). Such contributions may be made "directly to a candidate or such candidate's campaign committee." OCGA { 21-5-30 (a). Accordingly, a

campaign contribution, whether made to a candidate in the heat of a campaign or to encourage or influence the official after he is elected, is something which a candidate or elected official is qualified or privileged to request or receive and thus is something to which he is "entitled" within the meaning of OCGA { 16-10-2.

Consequently, we hold that the trial court's definition of "entitled," while not wholly incorrect, was incomplete and misleading in the context of this case and could have misled the jury to appellants' prejudice. See generally New v. State, 171 Ga. App. 392-393 (5) (319 SE2d 542) (1984).

Similarly, the trial court's failure to give request to charge 4, which included a portion of the definition of "contribution" found in OCGA { 21-5-3 (6), as part of the charge concerning the Ethics in Government Act, or to give requests to charge 2, 3, and 8, after adjusting them to the facts of the case, was error, as those charge requests embodied appellants' sole defense. "It is the law of this state that where there is only one defense on which a party relies, failure to instruct the jury as to the evidence supporting this defense with sufficient clarity and specificity that the jury will not only be required to pass upon it, but do so intelligently, in practicality directs a verdict against the defendant, in that the effect of the failure to charge is to withdraw and deny the defense and to that extent prejudices a defendant's right to a fair and impartial trial. [Cits.] Dinnan v. State, 173 Ga. App. 191, 195 (325 SE2d 851) (1984). Given the

evidence adduced during trial and the scope of appellants' charge requests, read as a whole the court's charge to the jury failed to inform them fully as to an essential element of the alleged crime or to explain appellants' defense and the evidence supporting it with sufficient clarity. Failure to so charge constitutes reversible error. See generally Dinnan, supra at 194-196 (1); New, supra at 392-393 (5).

4. It is also contended that the trial court erroneously permitted the admission into evidence of $7,500 in cash obtained when Lanier and Fletcher, at the direction of the district attorney, cashed the checks Agan had given them. The record reveals that as each payment to a commissioner was discussed by a witness, first the check was admitted into evidence, and then the State submitted the cash received by the witness upon cashing the check. The currency was displayed to the jury and used by the district attorney during closing argument. Although the State contends this enumeration has been waived because of the failure to interpose timely objection, we will address it because the same issue is likely to arise at retrial.

We find no merit in the State's argument that the currency was relevant to prove the commissioners had received something of value, as "[a] check, executed and delivered, is a contract in writing by which the drawer contracts with the payee that the bank will pay to the payee therein the amount designated on presentation [cits.]," Bailey v. Polote, 152 Ga. App. 255, 256 (1) (262 SE2d 551) (1979), and thus constitutes "considera-

tion" within the meaning of OCGA { 16-10-2. See Whitfield v. State, 159 Ga. App. 389, 400 (5) (283 SE2d 627) (1981). To the extent that there was any question as to whether the checks would be honored upon presentation, that fact could have been established either by testimony from bank officials or by testimony by Lanier and Fletcher that they were able to cash the checks. Further, we agree that admission of the currency into evidence and the manner in which it was displayed to the jury were highly prejudicial and inflammatory, and thus find its admission was error. See generally Tuggle v. State, 149 Ga. App. 634, 635 (3) (255 SE2d 104) (1979).

5. The trial court ruled that appellants were not entitled to a hearing on their motion to dismiss for selective prosecution. In support of this motion, appellants presented evidence that dozens of other real estate developers had made campaign contributions to county commissioners, including Fletcher and Lanier, while zoning matters concerning the developers' properties were under consideration by the commission, and also presented affidavit testimony that the county commission chairman had used a derogatory ethnic term in referring to Agan after a debate on variance application filed by Agan. The trial court held that appellants were not entitled to a hearing on their asserted defense of selective prosecution because they had failed to establish a prima facie case.

"In order to prevail in a selective prosecution defense, a defendant must meet the heavy burden of (1) making a prima facie

showing that he has been singled out for prosecution although other similarly situated persons who have committed the same acts have not been prosecuted; and (2) demonstrate that the government's selective prosecution was unconstitutional because actuated by impermissible motives such as racial or religious discrimination. [Cit.]" United States v. Silien, 825 F.2d 320, 322 (11th Cir. 1987); see Sabel v. State, 250 Ga. 640, 643 (4) (300 SE2d 663) (1983), overruled in part on other grounds, Massey v. Meadows, 253 Ga. 389, 390 (321 SE2d 703) (1984). However, although a defendant must satisfy this two-prong test to sustain a defense of selective prosecution, to be entitled to an evidentiary hearing on a selective prosecution claim a defendant need only present evidence sufficient to establish a "'colorable entitlement'" for the claim, or "sufficient facts 'to take the question past the frivolous state and [raise] a reasonable doubt as to the prosecutor's purpose.' [Cit.]" United States v. Gordon, 817 F.2d 1538, 1540 (1) (11th Cir. 1987).

After reviewing the record and the transcript of the pretrial hearing held in this case, we have concluded that the trial court, by ruling that appellants were not entitled to a hearing because they had not established a prima facie case, applied the wrong standard when determining whether appellants were entitled to a hearing on their selective prosecution claim. Although the issue is now moot as to Sarper, we have ruled that Agan is entitled to a new trial on other grounds. Accordingly, if upon retrial he

renews his motion to dismiss for selective prosecution, in deciding whether to grant an evidentiary hearing the trial court is to consider only whether Agan has demonstrated a "colorable entitlement" to a selective prosecution defense, not whether he has presented a prima facie case. If Agan presents evidence sufficient to raise a "reasonable doubt" as to the constitutionality of his prosecution, see Gordon, supra at 1540 (1,2), he will be entitled to an evidentiary hearing so that the full facts may be developed. See id.

6. Our decision in Division 1 (b), supra, makes consideration of appellant Sarper's remaining enumeration unnecessary.

Judgments reversed. Carley, C. J., Banke, P. J., Birdsong and Benham, JJ., concur. Pope, J., concurs in Divisions 1, 2, 3, 5, and 6, and in the judgment. Deen, P. J., McMurray, P. J., and Beasley, J., dissent.

DEEN, Presiding Judge, dissenting.

I must respectfully dissent from the majority opinion, because I believe that no reversible error occurred below and that both convictions should be affirmed.

1. The majority opinion errs in concluding that the evidence was insufficient to support Sarper's conviction. Initially, I note that in his brief, Sarper's argument on this issue consists solely of his adoption of Agan's argument on the sufficiency of the evidence. As Agan's argument is silent as to

the sufficiency of the evidence to convict Sarper, pursuant to Rule 15 (c) of our court, Sarper has abandoned any enumeration of error regarding this point. Nevertheless, even considering the merits of this contention, sufficient evidence authorized a rational trier of fact to find Sarper guilty beyond a reasonable doubt.

Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

The majority opinion reaches the opposite conclusion seemingly by accepting Sarper's testimony at face value. However, plenty of circumstances shown during the trial provided sufficient basis for the jury to make an opposite finding as to Sarper's credibility. For example, the jury could have found patently incredible Sarper's testimony that he sat through the meeting between Agan and Lanier as they discussed the variance at length and yet had no idea what they were talking about. When asked on cross-examination about the purposes of making political contributions to the commissioners, Sarper answered, "I presume that when you make political contributions to politicians, they do something to expedite the process. Everybody knows that." Sarper further replied, when asked if he knew that a politician will help you if you contribute to his campaign, "I have previously experienced it . . ." From these statements and circumstances, the jury could have rejected Sarper's claim of innocence and found instead a corrupt intent. "If something looks like [a bribe], sounds like [a

bribe], and acts like [a bribe], it probably is [a bribe], regardless of whether or not one uses the magic word itself." State v. Hughes (Case No. 77370, decided December 1, 1988) (Deen, P. J., dissenting).

"Left to exercise their commonsense in their own way, the jury will generally determine correctly what is well proved and what lacks further support . . . What shall come to the jury as evidence, is for the court. What it is worth when it arrives, is for the jury . . . The judge may well assume that they have a fair aptitude for their share of the common business." Moughon v. State, 57 Ga. 102, 106-107 (1876).

2. The trial court's jury charge on the definition of "entitled" under OCGA { 16-10-2 (a) was incomplete and somewhat confusing. Even the State concedes that. However, I cannot agree with the majority opinion that this minor confusion misled the jury. The jury charge informed the jury of the essential elements of the offense of bribery, and the evidence certainly proved those elements. Under these circumstances, the incomplete definition of "entitled" was inconsequential and harmless error.

I also cannot agree with the majority opinion's conclusion that the trial court erred in refusing to give the appellants' requested jury charges on the law and definition of campaign contributions. Comparison of the requested jury charges to the jury charge given by the trial court shows that the trial

court did adequately inform the jury on that subject matter. Failure to give requested charges in the exact language requested where the charge given substantially covers the same principles, is not grounds for reversal. Woods v. State, 187 Ga. App. 105 (369 SE2d 353) (1988).

3. The majority opinion is in error in concluding that the admission of cash, obtained when the commissioners presented the checks given to them by the appellants, was highly prejudicial and inflammatory and reversible error. The proper resolution of this enumeration of error simply is that the appellants waived any objection at trial. The cash from the $3,000 check was specifically admitted without objection by counsel for both Agan and Sarper. When the cash from the $3,370 worth of checks was tendered, Sarper's attorney stated that he had no objection, and counsel for Agan stated that he had his objection on the record, when there was, in fact, no objection on record. Only when the $800 cash from the check written by Mohammed Hassan to one of the commissioners was tendered, was there an objection. Counsel for Agan stated that he had the same objection, and counsel for Sarper merely objected on the grounds of relevance. Noting that there had been no objections before, the trial court admitted the cash into evidence. Under these circumstances, the appellants' waiver of any objection is clear. Even if the only objection to this evidence were considered, the district attorney's explanation that the cash was offered to show that the checks were good, was

a sufficient showing of relevance.

4. Assuming, arguendo, that, as advised by the majority opinion, the appellants would be entitled to an evidentiary hearing on their selective prosecution defense upon their showing a "colorable entitlement" to that defense, it is clear that the appellants failed in this regard. In support of their motion to dismiss for selective prosecution, the appellants submitted some evidence that other real estate developers had made some campaign contributions to county commissioners while zoning matters concerning the developers' properties were under consideration by the commission, and an affidavit in which a person recalled the county's chief executive officer's reference to Agan as a "g..d..sand nigger."

As noted by the majority opinion, "[i]n order to prevail in a selective prosecution defense, a defendant must meet the heavy burden of (1) making a prima facie showing that he has been singled out for prosecution although other similarly situated persons who have committed the same acts have not been prosecuted; and (2) demonstrate that the government's selective prosecution was unconstitutional because actuated by impermissible motives such as racial or religious discrimination. [Cit.]" United States v. Silien, 825 F2d 320, 322 (11th Cir. 1987). In the instant case, the appellants made no showing whatever of similarity between the other developers and themselves. Considering the fact that the county's chief executive officer does not vote

on zoning matters and does not even attend zoning meetings, and that it was the district attorney, and not the chief executive officer, who decided to prosecute the appellants for bribery, any derogatory ethnic remark attributable to the chief executive officer is irrelevant. The appellants thus made no showing of "colorable entitlement" to the defense, and the trial court properly denied both the request for an evidentiary hearing and the motion to dismiss.

5. Although the majority opinion does not address the issue because of its conclusion that the evidence did not support Sarper's conviction, I note also that the trial court did not abuse its discretion in denying Sarper's motion to sever. Rivers v. State, 178 Ga. App. 310 (342 SE2d 781) (1986).

I am authorized to state that Judge Beasley joins in this dissent.

46967

SUPREME COURT OF GEORGIA

Atlanta November 9,1989

The Honorable Supreme Court met purusant to adjournment.
The following order was passed:

THE STATE V. RAMSEY AGAN ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied. All the Justice concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/Joline B. WIlliams,
Clerk

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	CRIMINAL CASE NO.
	)	87-CR 3093
RAMSEY AGAN,	)	
MUSTAFA RAUF SARPER,	)	
	)	
DEFENDANTS.	)	

DEFENDANT'S REQUESTS TO CHARGE THE JURY

COME NOW Defendants, Ramsey Agan and Mustafa Rauf Sarper, before the Court commences its charge to the jury, and after having first served opposing counsel with copy of same, and submits this Honorable Court the following Requests to Charge the Jury, which Requests are attached hereto and numbered serially 1 through eight.

This 28th day of January, 1988.

_____

F. CARTER TATE
Attorney for Defendant
Abney, Tate & Mallernee
400 Colony Square
Suite 2020
Atlanta, Georgia 30361
(404) 875-4000
P. Bruce Kirwan

REQUEST NO. 2

It is not illegal or improper to make a contribution to the election or reelection campaign of an incumbent office holder.

1975 Op. Attorney General No. 75-143

REQUEST NO. 3

There is nothing improper or illegal about contributing directly to a candidate or public official. A citizen is entitled to present his contribution directly to the candidate or public official in person.

It is not illegal or improper to make a check out directly to the candidate or public official. The fact that the checks in evidence before you are made out to Mr. Fletcher and Mr. Lanier does not make them illegal.

O. C. G. A. 21-5-33.

REQUEST NO. 4

A campaign contribution is a payment which can reasonably be construed to encourage or influence a public officer holding elected office.

O.C.G.A. 21-5-3(6)

REQUEST TO CHARGE NO. 8

If you find that the checks given by the defendants to the elected officials are campaign contributions then you must acquit the defendants.

I further charge you that if the State has no direct evidence that the checks are not campaign contributions then the circumstantial evidence must convince you beyond a reasonable doubt that they are not campaign contributions.

REQUEST TO CHARGE NO. 9

It is not illegal to make a campaign contribution to a public official for the purpose of influencing his decision on a matter pending before, or which in the future may be considered by, the public official, if it is not conditional.

IN THE SUPERIOR COURT FOR THE COUNTY
OF DEKALB, STATE OF GEORGIA
JANUARY TERM, 1988

STATE OF GEORGIA	)	INDICTMENT NO. 87-CR-3093
	)	
vs.	)	VOLUME IV
	)	
RAMSEY AGAN and	)	Pages 809 (1.7) through 811 (1.9)
RAUF SARPER	)	

TRANSCRIPT OF EVIDENCE

Tried before the Honorable Robert J. Castellani, Judge, Superior Court, Stone Mountain Judicial Circuit, and a jury, in DeKalb County Superior Court, Decatur, Georgia, beginning on January 26, 1988.

A P P E A R A N C E S:

For the State: Robert E. Wilson,
District Attorney

and
R. Stephen Roberts,
Chief Assistant
District Attorney

For the Defendant (Agan): F. Carter Tate

For the Defendant (Sarper): P. Bruce Kirwan

Reported by: Lawson Thigpen,
Official Court Reporter
DeKalb County Courthouse, Decatur, GA 30030

As you know the defendants in this case are charged with the offense of bribery. Let me go over with you the Georgia Law, the definition which will contain the elements that must be proven by the State beyond a reasonable doubt for a conviction as to the kind of bribery. Under Georgia Law a person commits bribery when he gives or offers to give to any person acting for or on behalf of the State or any political subdivision thereof, any benefit, reward or consideration to which he is not entitled, with the purpose of influencing him in the performance of any act related to the function of his office or employment.

Now, the word "entitled" does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word "entitled" means to give a deed or title to.

I will further charge you that the DeKalb County Board of Commissioners serve DeKalb County and DeKalb County is a political subdivision of the State of Georgia.

Now, there is in Georgia Law an Act which is known as the Ethics in Government Act. This Act, among other things, discusses campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution. Now, for the purpose of this case, there are certain other elements of the definition which are not material. It is a rather long definition and it will be very confusing. What I have done is taken the relevant sections, the sections that I think are necessary for you to understand in your consideration of this case:

A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office.

I will further charge you that a campaign contribution, as I have just defined for you, can be made directly to the candidate.

Now, I will further charge you that under Georgia Law campaign contributions can be made for use in future campaigns for elective office.

In this regard, and in light of the instructions I have given you earlier, I will tell you that <u>it is not the use to which the money may be put, but it is the purpose for which the money was paid that controls.</u>